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In the Supreme Court of the United States

October Term, 1962

No. [redacted] 187

FRED ISAACS AND HARRY ISAACS

Petitioners

vs.

UNITED STATES OF AMERICA

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled case on March 22, 1962.

CITATIONS TO OPINIONS BELOW

The Opinion of the Court of Appeals for the Eighth Circuit is not reported and is printed in a separately bound Joint Appendix, p. 1. The Opinion of the District Court is not reported and is printed in the Joint Appendix, p. 67.[1]

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[1] The Joint Appendix is hereinafter cited as "App. p. ". The review below was had on the original papers and the typewritten transcript of the evidence and proceedings at trial. The transcript

JURISDICTION

The judgments of the Court of Appeals were entered on March 22, 1962 (App, pp. 111-12). Timely petitions for rehearing were denied on April 20, 1962 (App. p. 117). Time for filing of petitions for writ of certiorari was extended to and including June 19, 1962, by Order of Associate Justice Byron R. White (App. p. 119). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 and Rule 22(2) of this Court.

QUESTIONS PRESENTED

1. Whether knowledge of a single conspiracy with multiple objectives and a purpose to further it may be permitted as a matter of law to be found as against petitioners, solely from their participation in one of the conspiracy's major objectives, where the success of that objective was not dependent on the success of any other objective of the conspiracy.

2. Whether a conviction may be affirmed where the trial court submitted a basic issue to the jury on two alternative theories, one of which was found by the court below not to be supported by any evidence.

STATEMENT

In 1950, and for many years prior thereto, the Twin City Rapid Transit Company and its subsidiaries (herein called the "Transit Company") operated a street railway

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of the proceedings in the trial court consists of seventy-two (72) numbered, typewritten volumes, cited herein as "V. , p. ", together with several unnumbered, typewritten volumes of the pretrial proceedings identified only by date and so cited herein. The Government exhibits received in evidence are cited by the alphabetic number, viz. "Exh. BZ", those of defendants by the name of defendant and arabic number, viz. "H. Isaacs, Exh. 1", in accordance with the designation at the trial.

system in Minneapolis and St. Paul, Minnesota, and adjacent suburbs (V. 4, p. 103; V. 5, pp. 125-8).

In March, 1951, one Fred A. Ossanna was elected Chairman of the Board of the Transit Company, and in the fall of 1951, its President (V. 28, pp. 70, 75). Under the Ossanna administration the Transit Company converted to bus operation and in March, 1952, employed one Benson M. Larrick to conduct the conversion (V. 6, p. 123).

One Indictment (4-59-Cr. 77) in a series of Counts charged that Ossanna, Larrick and James A. Towey (an officer of the Transit Company not tried because of illness) and Isadore Blumenfield (a stockholder in the Transit Company, later acquitted by the jury) had conspired with petitioner Harry Isaacs and others in a single over all scheme to defraud the Transit Company in the disposition of street railway property which became surplus in the conversion to bus operation and in that connection had made use of the mails and interstate wire communications (V. 69, pp. 5-18).

The Indictment charged that, as "parts" of the single scheme, certain scrap was transferred to petitioner's Company, American Iron and Steel Corporation ("American Iron"), certain real estate and equipment were transferred to petitioner Harry H. Isaacs (which the trial court ruled was not fraudulent, V. 69, p. 95) and various other assets and commissions were transferred or paid to other parties (V. 69, pp. 8-15). A subsequent Count of this Indictment (Count XVII) charged that all the defendants, including Earl Jeffords, a real estate broker, and other co-conspirators not named as defendants, had combined in the same scheme to defraud and to transfer the same assets as "parts" of the scheme (V. 69, p. 20).

The second Indictment (4-60-Cr. 13), consolidated with

the first Indictment, charged petitioner Fred Isaacs and Theodore Landy (later acquitted by direction of the Court) with having become a party to the same single conspiracy charged in Count XVII of the first Indictment (V. 69, p. 5).

Certain intermediate Counts in the first Indictment charged Ossanna, Larrick, Towey, and petitioner Harry H. Isaacs with engaging in a scheme to accomplish the interstate shipments of certain scrap acquired by fraud by American Iron from the Transit Company (V. 69, pp. 18-20), which scrap the Government through its answer to a Motion for a Bill of Particulars claimed was the same scrap allegedly acquired in fulfillment of the same scheme to defraud (V. 43, p. 110).

At the trial, there was evidence of fraud in the transfer of scrap by the Transit Company to American Iron, and in the sale of real estate and payment of commissions to others, though none in the sale of real estate and equipment to petitioner Harry H. Isaacs. It also appeared that the scrap transactions were the largest in suit and overlapped the others in time. But there was no evidence that the scrap transactions depended on the conceiving or consummation of the other objectives for their success, or were connected in any way with the others, though all the transactions related to the disposition of surplus property and an officer or officers of the Transit Company necessarily participated in all.

The evidence, summarized in terms most favorable to the Government's contentions, can be stated as follows:

The Scrap Transactions: The Transit Company employed American Iron to remove track, trolley wire and other overhead appurtenances in exchange for the salvage removed, first under an exchange of letters between Os-

sanna and petitioner Harry H. Isaacs in July and August, 1951 (Ossanna Exhs. 2, 4, 5, V. 7, pp. 29, 31-4), and then under a formal written contract of February 11, 1952 (Exh. BZ, App. p. 101) and two Addenda thereto (App. pp. 106, 109). The letter agreement required American Iron to "repave wherever necessary" and the formal contract obligated it to "resurface * * * as required by all City Ordinances" of Minneapolis, as the Transit Company was obligated to do under its franchise (V. 6, p. 97; V. 21, pp. 43-4). In practice, American Iron was not required to repave at any time after the formal contract was executed; it had been required to do so on one street in 1951 (V. 20, p. 36; V. 50, pp. 115-16), but there was evidence that the Transit Company had borne the cost of that repaving (Exhs. I-M, I-N, V. 9, pp. 38-9). On October 30, 1953, the City of Minneapolis adopted an ordinance, accepted by the Transit Company on November 27, 1953, under which the Transit Company (and hence American Iron) was relieved of its franchise obligations to perform such removals and repaving, in consideration of $922,700.00 in cash payable over a ten-year period and the removal of so-called "special work" in paved intersections up to a cost of $300,000.00 (App. p. 87). American Iron did not contribute to the Transit Company's cost in cash or services and, so far as appears, was not asked to do so.

The potential cost of removing the rails and repaving in paved streets in Minneapolis substantially exceeded the salvage value of the track and overhead, possibly by as much as $1,000,000.00 (V. 7, p. 136; V. 21, pp. 100, 112; V. 26, p. 43; H. Isaacs Exh. 113, rec'd. V. 59, p. 25). The second addendum to the removal contract, however, dated January 2, 1953, extended to American Iron in terms the right of "removal of underground cables" (App. p. 110),

a provision which could reasonably be construed as extending to all such cables in the Transit Company system (V. 69, pp. 87-8), then of an estimated value of $1,000,000.00, less an estimated cost of removal of $50,000.00 (Exh. AG-2, V. 6, pp. 39-40). In practice, the cables were removed by the Transit Company's own forces and delivered to American Iron (V. 14, pp. 44-5; V. 15, p. 1). Petitioner Fred Isaacs reported to the Transit Company only some 20% of the weight actually received (Exh. JT, rec'd. V. 23, p. 121; Exh. K-1, rec'd. V. 22, p. 122; Exh. JX-4, rec'd. V. 24, p. 118), and American Iron paid for the weight so reported at prices substantially below the market value (V. 25, pp. 105-10), but in a total amount exceeding the estimated cost of removal of all the cable (H. Isaacs Exh. 114, V. 56, pp. 153-7, 179-80). If the second addendum were construed as giving American Iron the right to retain the cables for the service of removing them, as American Iron construed it (App. p. 16), but the Transit Company pulled them for its own purposes, instead of permitting American Iron to do so, American Iron was required to reimburse the Transit Company for the cost of removal, as the trial court agreed (V. 60, p. 106).

The removal contract of February 11, 1952 gave American Iron first option to purchase other, miscellaneous scrap at "ceiling price"; such prices were in effect from January, 1951 through February, 1953 under federal regulations (App. p. 105; V. 46, p. 56). In prior practice, the Transit Company had cleaned, sorted and prepared such scrap to the various specifications of steel mills and refineries, recorded it in inventory, and sold it on competitive bids at the Transit Company's own weights (V. 8, pp. 18-19, 141-2). The Transit Company delivered such scrap to

American Iron without preparation, inventorying, or competitive bidding, and at American Iron's own weights and prices (V. 8, pp. 79, 89-91; V. 26, p. 77). Much of such scrap contained debris and some was worthless (V. 16, pp. 78, 105; V. 18, pp. 125-137). Petitioner Fred Isaacs furnished the Transit Company weight slips reporting 5% to 75% less than the gross weights of the scrap received (H. Isaacs Exhs. 111, 112, rec'd V. 56, pp. 20, 26; V. 16, pp. 25-30). These were forwarded to Larrick, in charge of the Transit Company's scrap program (V. 4, pp. 137-9), and he, in turn, sent American Iron the monthly totals for pricing and remittance (V. 22, pp. 132-140).

The Midcontinent Transaction: On December 22, 1953, the Transit Company contracted to sell petitioner Harry Isaacs, doing business as Midcontinent Construction and Development Company, certain real estate and machinery and equipment for $300,000.00, $100,000.00 in cash and $200,000.00 payable in one year (V. 31, pp. 46-50). All but one of the properties were certified by a qualified engineering firm approved by the Trustees for the company's bondholders, as having a value not in excess of the sale price (V. 32, pp. 105-18). On December 22, 1953, Harry Isaacs entered into a partnership agreement with one Robert Levitt, giving Levitt 52½% of the profits from development and sale of the properties so acquired, in exchange for his guaranteeing payment of the $200,000.00 (Exh. LZ, V. 31, pp. 57, 64-5). Levitt, in turn, took as subpartners his clients, the defendant Blumenfield and four business associates (V. 31, pp. 67-8), though this was not then known to Isaacs or Ossanna (V. 69, pp. 94-5).

The trial court ruled that the Midcontinent transaction was not fraudulent as a matter of law, and dismissed two

related mail fraud counts, but permitted it to be considered on the relationship of the parties (V. 61, p. 72; V. 69, p. 95).

Other transactions: There was evidence of fraud in other transactions tried in the same proceeding. Neither petitioner participated in any of them, or even knew any other defendant or alleged co-conspirator, except the Transit Company officers with whom they dealt in the scrap transactions.

(a) *Mexican Notes:* In 1955, the Transit Company discounted eight notes (V. 27, pp. 119, 170-1), acquired in part payment for streetcars sold in September, 1953 to a transit agency in Mexico City and guaranteed by Nacional Financiera, S.A., an agency of the Mexican Government (Exh. CP-2, V. 28, pp. 29, 33-5). From a total of $728,256.00 received, the Transit Company paid commissions of $238,349.73 to one George A. Francis, who was ostensibly engaged in the export-import business in Mexico City and named as a co-conspirator but not as a defendant (V. 30, pp. 109-10; Exh. BE-26, rec'd. V. 30, p. 88). Francis did not buy the notes (V. 27, pp. 119, 170-1; V. 29, pp. 39-40), and there was evidence that the then going rate of commission for brokerage services was ¼% to 1% of the face amount of the notes, or less than $10,000.00 (V. 30, p. 29). One payment to Francis was deposited in a Miami, Florida, bank, from which Francis withdrew $53,000.00 in cash (Exh. LP; V. 30, pp. 39, 45).

(b) *Hopkins right-of-way:* On May 6, 1955, on recommendation of Ossanna, the right-of-way formerly used for service to the Village of Hopkins, valued between $84,500 and $150,000 (V. 34, pp. 40-1, 133-40), and for two years unsuccessfully offered for highway purposes (V. 35, pp. 3-24), was sold for $10,000.00 to one W. N.

Carlson, named as co-conspirator but not as a defendant (Exh. DD, V. 55, p. 107). Carlson shortly thereafter entered into an agreement with Ossanna's son and daughter to share, as he claimed, the profits and losses fifty-fifty (V. 55, pp. 87-9). Carlson sold the real estate for $125,050 over a three year period (V. 36, pp. 64-66) and paid $52,000 to Ossanna's son and daughter (V. 36, pp. 54-7; Exh. ND-1 rec'd. V. 36, p. 31). They in turn paid $30,000.00 to Ossanna personally and to an Ossanna family corporation, to repay an indebtedness to them, Ossanna claimed (V. 51, pp. 147-8, 158-9, 165).[2]

(c) *Jeffords Commission:* During the period July 6, 1954 through February 16, 1955, the Transit Company paid defendant Jeffords, doing business as J & C Holding Company, a total of $107,500.00 as purported commissions on the sale of three properties (V. 36, pp. 85-6; V. 37, p. 55; V. 38, pp. 114-15). There was evidence that Jeffords did not procure the purchases and had no valid listings (V. 36, pp. 72-83; V. 37, pp. 24-8, 136, 181-4; V. 38, pp. 107-15, 176). Jeffords withdrew substantial sums in cash as received (V. 39, pp. 83-6, 100, 102) and claimed that he lost $65,000.00 gambling in Florida (V. 38, pp. 53, 54).

(d) *The Towey Lots:* On March 1, 1954 Towey purchased two lots from the Transit Company in his uncle's name for $500.00 and resold them for $5,500.00

[2] On May 23, 1955 Jeffords and his partner, one Marvin Benjamin, acquired an option from Carlson to purchase 800 feet which were in fact located on the Hopkins right-of-way, which agreement was on November 25, 1955 modified so as to release to Carlson 650 feet in consideration of $8000.00 (Exh. NC-1, V. 35, pp. 55-7; Exh. NE-1, V. 35, pp. 57, 61). In July, 1955, Jeffords and his partner sold 150 feet for $12,000 (V. 35, pp. 64-5), with the result that, on all the transactions, they made a net profit of $14,000.00.

while masquerading as his uncle (V. 33, pp. 91-3, 172-3, 178-9).[3]

Such, basically, was the evidence, viewed most favorably to the Government. Although no question is presented as to the sufficiency of the evidence of fraud in the scrap transactions, or any transaction in suit, separately considered, a further statement is required for a consideration of the second of the two questions presented on this petition, involving the Minneapolis Conversion Ordinance.

The Minneapolis Conversion Ordinance: The trial court permitted the jury to find fraud in the procurement and enactment of the Minneapolis Conversion Ordinance, of which the court below specifically found there was no evidence. That court however affirmed the convictions of petitioners on another theory, for which there was evidence.

The removal contracts, as the trial court instructed, required American Iron to perform or to be ready, willing and able to perform, all of its contract obligations, including the most onerous one, that of repaving in Minneapolis, as a condition of obtaining track and overhead or underground cable in exchange for the service of removal (V. 69, pp. 87-8). The Indictment charged that American Iron was fraudulently relieved of its contract repaving obligations as a "part" of the scheme to defraud (V. 69, p. 11), and this became a major issue at the trial (see, e.g. V. 20, pp. 16-120; V. 21, pp. 8-114, 180-99; V. 49, pp. 190-200; V. 50, pp. 3-123; V. 69, pp. 39-40, 88-9).

[3] On January 17, 1955, the Transit Company paid one Paul Villaume a reasonable $37,500.00 commission for services in procuring the sale of certain real estate (V. 37, pp. 190-1). Villaume thereupon made a donation of $7500.00 to the Ossanna Foundation (V. 37, p. 193). The Government's theory, as stated by the Court below was that as a part of the scheme to defraud the Transit Company paid in the form of a commission $7500.00 more than it was obligated to pay Villaume (App. p. 31).

In particulars given in advance of trial, the Government claimed that the fraud occurred at the time, and because, of the enactment of the Minneapolis Conversion Ordinance of October 30, 1953 and its acceptance by the Transit Company, which action relieved American Iron, without any consideration, of its obligations to repave. This claim was stated by the Government as follows:

> "Mr. Janes: * * * the Transit Companies had, of course, the obligation to resurface. It was the Transit Companies' obligation to the City. After there had been some removal of rail and some lesser repaving, the Transit Companies acquired a release from the City of its entire obligation for a substantial consideration, and in so doing, at the Transit Companies' expense, achieved the release of American Iron and Supply Company's obligation to do some repaving, and released the Transit Companies' obligation in the future, and anybody else's that might arise, by contract or otherwise, throughout the City.
>
> "The Court: Do you mean that the Transit Companies, for a consideration paid to the City, were released of their obligation to resurface certain streets; and American, in its contract with Transit, had agreed, as a part of the consideration for the salvage, to resurface those streets, and consequently, your position is that American received that benefit that enured to the Transit Companies without paying any consideration therefore?
>
> "Mr. Janes: That is right."
>
> * * *
>
> "The Court: The remaining streets that had to be resurfaced by American, American was relieved therefrom by reason of Transit paying a consideration to the City of Minneapolis to be relieved of its initial [franchise] obligation, and therefore, a benefit was

bestowed on American that it was not entitled to in view of its contract with Transit, and Transit illegally or unlawfully gave it a benefit to which it was not entitled?

"Mr. Janes: Right." (Transcript of Proceedings of October 16, 1959, pp. 133-5).

Alternatively, the Government on the same occasion claimed that the fraud may have occurred *before* the enactment of the ordinance, as follows:

"Mr. Janes: * * * I would like to add to that, that we have evidence that American Iron had been relieved by the Transit Company of its paving obligations *prior* to the transaction with the City, between the Transit Company and the City relieving it of the obligation". (Id. p. 136; italics supplied.)

At the trial, the Government stated its first claim as follows:

"The Court: The enactment of this ordinance to the extent that American * * * was (not) obliged to repave didn't enure to the benefit of American * * *. That was a perfectly okay transaction between the streetcar company and the City of Minneapolis relieving the Transit Company of repaving these streets, is that right?

"Mr. Janes: That is right.

"The Court: Then your contention is that to the extent that American was obliged to repave and to the extent it was relieved of its obligation to repave, then the release obtained from the Transit Company was an incident here that you contend had some fraudulent aspects?

"Mr. Hyam Segell: Yes, sir, third party beneficiary." (V. 21, pp. 186-7).

In stating its alternative claim at the trial, the Government asserted that the parties had "abandoned" the removal contracts (V. 49, p. 203), and added that the removal contracts were only a "paper matter placed in the files, rather than a contract between two parties at arm['s] length intending to carry it out" (V. 42, p. 130), and were drawn in that form "to hide what was going on" (V. 43, p. 25).

The minutes of the proceedings leading to the enactment of the conversion ordinance (V. 50, pp. 125-147; V. 51, pp. 80-136) made it "crystal clear," as the court below concluded, that there was "no fraud", on the part of the representatives of the company in the "actual procurement or adoption of the ordinance" (App. p. 49).[4] There was uncontradicted evidence, moreover, that the Transit Company was released by the ordinance, not only of its obligation to repave the "surfaces" (which American Iron had assumed) but of its additional obligations to repave tie beds in poor condition and to clean and remove snow from streets along its routes (which American Iron had not assumed), with a resulting financial benefit to the Transit Company substantially in excess of the cost which it incurred under the ordinance (V. 21, pp. 45, 51, 55; Larrick Exh. 27, rec'd. V. 48, p. 44).

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[4] Faced with this evidence, the Government conceded in final rebuttal argument at the trial that the "conversion ordinance wasn't a part of any scheme" to defraud (V. 68, p. 65). The trial court nevertheless submitted to the jury the question of whether there was fraud in procuring the enactment of the ordinance, as hereafter set forth, and in the court below the Government claimed that its concession was in error and that there was in fact "fraud in the procurement of that ordinance." (Transcript of Oral Arguments of counsel, p. 128). The Government referred (id. pp. 128-30) to a letter from Harry Isaacs to Ossanna of July 28, 1953, which requested renegotiation of the removal contracts because of alleged excessive costs (Exh. HI-1 V. 9, pp. 55-7) and to the authority granted to Ossanna by the Transit Company on August 21, 1953, to renegotiate the contracts (V. 9, pp. 52-5), and claimed that,

In charging the jury, however, the trial court failed and refused to give an instruction requested by petitioners that

> "There is no evidence that the passage of the Minneapolis Conversion Ordinance in October 1953 was procured with the design of relieving American of its obligations to repave any of the streets in Minneapolis, or as a part of any scheme to defraud the Transit Company." (App. p. 46).

Instead, the court charged the jury that it was "the Government's position" that defendants schemed to relieve American Iron of its paving obligation "by the passage of the Ordinance" (App. p. 120), and instructed the jury to determine whether there was fraud in the passage of the Ordinance, as follows:

> "*What about the ordinance passed by the City of Minneapolis* to relieve the streetcar company of its duty to remove tracks and repave and the other obligations which the streetcar company had under its franchise? *Was that a device arranged by Ossanna and Isaacs to free American from the alleged onerous burden of going forward with the contract,* Government's Exhibit BZ?" (App. pp. 121-2, italics added).

The court separately submitted to the jury the alternative claim of the "Government" that "the parties never intended in good faith to go forward with the contracts according to their terms regarding the demolition of the system" (App. p. 121) as evidenced by, among other things, "relieving of

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while there was no evidence that the contracts were ever renegotiated, there was evidence that American Iron's operations had in fact been profitable and that Ossanna's motive in negotiating the enactment of the conversion ordinance was to relieve American Iron of its repaving obligations. As stated, however, the court below concluded that there was no fraud in the actual procurement or adoption of the ordinance.

American of its obligation to remove the rails and to repave by the Minneapolis City Ordinance * * *" (App. p. 121).

Petitioners duly objected to the submission of the alleged over-all scheme and conspiracy to defraud by motions, made both at the conclusion of the Government's case and at the close of all the evidence, to strike as to them all evidence other than that relating to scrap (V. 41, pp. 57, 59-61, 79-89, 92-3; V. 60, pp. 192-3), to sever and grant petitioners a separate trial as to the scrap transactions (V. 44, pp. 42-4; V. 45, pp. 32-3; V. 60, p. 193), and for judgment of acquittal (V. 43, pp. 121-2; V. 60, p. 196), all of which were overruled, and duly excepted (V. 70, pp. 1, 6) to the trial court's instructions to the jury submitting the over-all scheme as to them (V. 69, pp. 53, 85-6, 94-5, 104-7, 111, 141-2). Petitioners also sufficiently reserved objection to the instructions given with respect to the Minneapolis Conversion Ordinance by excepting to the failure to give the instruction requested withdrawing from the jury the issue of fraud in the passage of the Ordinance (V. 70, pp. 4-5), as the court below concluded (App. p. 47).

Petitioner Fred Isaacs was convicted of conspiracy, and petitioner Harry H. Isaacs of conspiracy and on eight substantive counts, including five alleging mailings in furtherance of the alleged scheme to defraud and three alleging interstate shipments of scrap obtained by fraud. After motions for judgment of acquittal or a new trial were overruled (App. p. 67), petitioner Fred Isaacs was sentenced to imprisonment for a year and a day and fined $2,500.00, and petitioner Harry H. Isaacs was sentenced to four years' imprisonment and fined $1,000.00 on the mail fraud counts, to a concurrent term of four years and fined

$10,000.00 on the conspiracy and interstate shipment counts, and to pay one-half of the cost of prosecution.[5]

On appeal, the court below affirmed, observing that the trial was a protracted one (App. p. 11) and was presided over by an experienced and distinguished jurist (App. p. 65) and concluding that participation in the scrap transactions warranted a finding of knowledge of the overall conspiracy alleged and that, while there was no evidence of fraud in the actual procurement or enactment of the Minneapolis Conversion Ordinance, the convictions should be affirmed on another basis (App. pp. 49-51) more fully discussed below, *infra*, p. 21.

REASONS FOR GRANTING THE WRIT

1. The court below decided an important question affecting the reach of conspiracy prosecutions, and in a manner in conflict with the decisions of this Court.

In *Kotteakos v. United States*, 328 U.S. 750 (1946), this Court set aside convictions of a single general conspiracy because of prejudicial error in permitting the jury to find a single conspiracy to obtain home improvement loans by fraud, where the evidence showed eight or more separate groups of loan applicants connected with each other only in that each dealt with a single common figure as their agent in applying for the loans.

In the court below, the Government conceded that the case of petitioner Fred Isaacs was governed by *Kotteakos*

[5] Prior to its charge to the jury, the trial court dismissed certain counts in No. 4-59-Cr 77, Count X, alleging a mailing relating to the transfer of certain real estate, and Count XIII relating to the Villaume transaction as well as Counts IV and XI relating to the Midcontinent transaction. The jury found petitioner Harry H. Isaacs not guilty on Counts VII, VIII and IX of that Indictment, alleging mailings and interstate wire communications relating to the Mexican note transaction, and found all defendants not guilty on Count XII thereof, alleging another mailing relating to the Villaume transaction.

unless he were sufficiently connected with the "over-all scheme" alleged,[6] and in the trial court stated that, absent a showing of such a scheme, there should be "a dismissal" of all the mail fraud and conspiracy counts (V. 43, p. 39).

The court below, however, held that the participation of petitioner Fred Isaacs in "one" of the "major" objectives of the conspiracy alleged was sufficient. The court said (App. p. 42):

> "The fraudulent disposition of the scrap became and was one of the major objectives of the scheme, it was part and parcel thereof, and, being so, sound authority and common logic dictate that Fred Isaacs became a knowing participant in the scheme and aided in its perpetration."

The court upheld the conviction of petitioner Harry H. Isaacs on substantially the same basis (App. pp. 41-2).

The court so held, notwithstanding that the scrap transactions were not dependent on any others for their success and were not connected with them, though all the transactions occurred in the disposition of surplus property of various kinds and one or more of the Transit Company officers participated in all.

(a) An important question is thus presented whether the decision below unduly broadens the reach of conspiracy prosecutions. In *Grunewald v. United States*, 353 U.S. 391, 404 (1957), this Court stated that it would "view with disfavor attempts to broaden the already pervasive and wide-sweeping net of conspiracy prosecutions", as it had "repeatedly warned" in prior cases, and referred to Justice Jackson's familiar strictures against such prosecutions (see *Krulewitch v. United States*, 336 U.S. 440,

[6] Transcript of Oral Arguments of Counsel, pp. 117-19.

445 (1949) in concluding that "the important considerations of policy behind such warnings need not be again detailed", 353 U.S. at 404.

(b) The test of guilt applied by the court below is in conflict with those established by this Court.

This Court has held that where, as here, a single conspiracy with multiple objectives is alleged, the required "knowledge" of the common design, *Direct Sales Company v. United States*, 319 U.S. 703, 711 (1943), and a "purpose to further" it, *Scales v. United States*, 367 U.S. 203, 226-7, n. 18 (1961); *Direct Sales Company v. United States, supra*, at 711, may not be inferred solely from participation in one of the objectives which is reasonably explainable without reference to a larger plan. *Ingram v. United States*, 360 U.S. 672, 679-80 (1959); *Kotteakos v. United States, supra; Blumenthal v. United States*, 332 U.S. 539 (1947).

In *Ingram*, this Court renewed a prior warning that "evidence of knowledge must be clear, not equivocal", because "charges of conspiracy are not to be made out by piling inference upon inference" (360 U.S. at 680, quoting 319 U.S. at 711), and held that the collaboration of employees with their employers in concealing a gambling operation illegal under local law was "colorless" on the "vital issue of knowledge" of their employers' wilful evasion of federal tax liability, because the "criminality of the enterprise under local law provided more than sufficient reason for the secrecy in which it was conducted", 360 U.S. at 679.

In *Kotteakos*, moreover, this Court approved the ruling of the Court of Appeals for the Second Circuit (151 F. 2d 170, 173) that even knowledge by the petitioners that the common figure with whom they dealt was then engaged in similar transactions with others, was insufficient basis to support a finding of a common purpose (328 U.S. at 755),

and this on the ground, as the Court later explained, that except for the common figure, "no conspirator was interested in whether any loan except his own went through," *Blumenthal v. United States, supra,* at 558.

In *Blumenthal,* on the other hand, the Court upheld the conviction of several salesmen as participants in a single, illegal scheme to sell whiskey at over ceiling prices, where the "salesmen were aware that their individual sales were part of a larger common enterprise, *dependent* on the carefully evolved arrangements to give the sales the guise of legitimacy, to dispose of a larger store of liquor" (id. at 555, n. 14, italics supplied).[7]

The decisions of this Court cited above forbid conviction of the conspiracy charged merely because of the relative size of the transactions embraced. The size of the scrap transactions, to which the court below referred, plainly gives rise to no inference that petitioners had any knowledge that there was a larger plan embracing other, fraudulent transactions, much less that they had any "purpose to further" any such larger plan. Cf. *Canella v. United States,* 157 F. 2d 470 (C.A. 9, 1946).[8]

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[7] In such cases, where each participant is a "necessary link in a scheme of distribution", *United States v. Bruno,* 105 F. 2d 921, 923 (C.A. 2, 1939), *rev'd. on other grounds, Bruno v. United States,* 308 U.S. 287 (1939), the courts give "recognition to . . . reality, namely, that there must of necessity be a division of labor and function by those engaged" in such a criminal business. *United States v. Rich,* 262 F. 2d 415, 418 (C.A. 2, 1959).

[8] In its opinion, the court below observed parenthetically that "(the scheme had its genesis in the handling of the scrap and had its demise in the scrap)" (App. p. 41). The court below, however, did not suggest that the fact that the scrap transactions were first in point of time rendered petitioners responsible for any additional objectives added later, and could not do so in view of the elementary principle that "(n)obody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it; if later comers change that, he is not liable for the change" *United States v. Peoni,* 100 F. 2d 401, 403 (C.A. 2, 1938); *Hanis v. United States,* 246 F. 2d 781, 787 (C.A. 8, 1957), as the trial court in substance charged (V. 69, pp. 106-7).

(c) Petitioner Harry H. Isaacs also participated in the Midcontinent transaction, as the court below pointed out. But, as that transaction was not fraudulent as a matter of law (V. 69, p. 95), no inference may be drawn from his participation therein that he knew that the officers of the Transit Company with whom he dealt were guilty of fraudulent conduct in other transactions not involving the disposition of scrap.[9]

Harry H. Isaacs was also convicted of use of the mails to further the scheme to defraud, as well as of conspiracy. But the "scheme to defraud" alleged was identical with the conspiracy charged, and it was common ground at the trial and in the court below that the several transactions alleged as "parts" of both the scheme and the conspiracy could not, as to any defendant, properly be tried together in the one proceding, save on a showing that such defendant was sufficiently connected with the single scheme and conspiracy alleged (V. 69, pp. 104-7; App. p. 37).[10]

[9] The court below also pointed to the loan of $10,000.00 made by Larrick to petitioner Harry Isaacs on April 4, 1955, repaid with interest on September 21, 1955 (V. 39, p. 45) as evidence of the close relationship between the two (App. p. 41). However, the dealings between them in the scrap program provided "'more than sufficient reason" for that relationship, since Larrick was in charge of the Transit Company's scrap program (V. 4, pp. 137-9) and visited the American Iron scrap yards at least once a week (V. 18, pp. 111-13), *Ingram v. United States, supra* at 679. The relationship between the two was obviously no closer than that between Brown, the common figure in *Kotteakos v. United States, supra*, and the petitioner Kotteakos, who, in addition to making fraudulent loan applications of his own through Brown, forwarded to Brown like applications from others, *Kotteakos v. United States, supra*, at 754, or between the employers and their employees in *Ingram v. United States, supra.*

[10] The trial court permitted the jury to find petitioner Harry Isaacs guilty on three interstate shipment counts, without a finding that they were consummated in pursuance of the over-all scheme to defraud (V. 69, pp. 51-2). In the court below, the Government conceded that petitioner may have been prejudiced thereby if he was insufficiently connected with the over-all scheme alleged (Transcript of Oral Arguments of Counsel, pp. 157-8). The court

2. In finding no error or prejudice in the trial court's instructions on the issue of fraud in the Minneapolis Conversion Ordinance, the court below decided a further question of importance in the administration of criminal justice in the Federal courts, and in a manner in conflict with the decisions of this Court.

The court below found it "crystal clear" that there was "no fraud" in the "actual procurement or adoption of the ordinance," but recognized that the trial court's instructions "might be susceptible" to an interpretation permitting the jury to find the contrary. The court concluded, however, that there was no error in the instructions because such fraud "was never an issue," that the issue litigated was whether *before* the ordinance the parties had never intended to enforce American Iron's repaving obligations, so that the Transit Company was "later of necessity" forced to obligate itself to the City, and hence that the instruction "did not serve to misdirect the jury" (App. pp. 49-50).

Alternatively, the court held that any error was not prejudicial because to "assume that the jury found no fraud in the scrap transactions, even though the evidence of fraud, quite apart from the ordinance, was substantial, and that it did find fraud in the procurement of the conversion ordinance, where there was absolutely no evidence of fraud," would require the court to "indulge in the assumption" that the jury "lacked all common sense" (App. pp. 50-1).

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below found it unnecessary to consider this question, since the sentence imposed on these counts and the conspiracy count was a general one and the court below found petitioner was sufficiently connected with the over-all conspiracy alleged (App. p. 51). In the event the petition for certiorari is granted, we respectfully request leave to argue that it was prejudicial error to submit the interstate shipment counts along with the mail fraud and conspiracy counts in the absence of evidence to support conviction of the single scheme or conspiracy charged. Cf. *Schaffer v. United States*, 362 U.S. 511 (1960).

(a) The alternative ground of decision, that any error was not prejudicial, was plainly in direct conflict with this Court's decision in *Bollenbach v. United States,* 326 U.S. 607, 614 (1946), that error in a basic instruction is prejudicial, notwithstanding "abundant evidence" to support a finding of guilty on a proper theory, and ignored the "influence of the trial judge on the jury" in instructing the jury, in effect, that there was evidence of fraud in the enactment of the ordinance, *Starr v. United States,* 153 U.S. 614 at 626 (1894).

The initial holding below, that there was no error in the trial court's instructions, cannot be reconciled with this Court's explicit admonition that a "conviction ought not to rest on an equivocal direction to the jury on a basic issue." *Bollenbach v. United States, supra* at 613; *M. Kraus & Bros. v. United States,* 327 U.S. 614, 627 (1946); *Yates v. United States,* 354 U.S. 298, 327 (1957). The trial court's instructions admittedly were "susceptible" to an interpretation permitting the jury to find fraud in the actual procurement or adoption of the ordinance, a major issue at the trial. See, *supra,* pp. 11-13.

The conflict with the decisions of this Court is even plainer if it be assumed, as the court below concluded, that such fraud was never an issue at the trial. The court below did not question that an unequivocal submission of a claim not in issue or unsupported by any evidence would have been plainly erroneous. *Nash v. United States,* 229 U.S. 373, 380 (1913); *Quercia v. United States,* 289 U.S. 466, 470 (1933). The court, however, found in effect that the trial court's instructions were "equivocal" and could thus be construed as also submitting a claim that had been tried and was supported by evidence. It thus made a virtue of the very vice of equivocation specifically condemned in *Bollenbach.*

(b) The importance of the question presented needs no extended comment, "(i)n view of the place of importance that trial by jury has in our Bill of Rights," *Bollenbach v. United States, supra,* at 615. Only yesterday, in holding indictments for contempt of Congress fatally defective in omitting to state the subject under investigation at the time of defendants' refusals to answer interrogatories of a congressional subcommittee, this Court emphasized that the omission would enable "conviction to rest on one point and the affirmance of the conviction to rest on another," *Russell and others v. United States,* Nos. 8-12, 128, October Term, 1961, decided May 21, 1962.

We recognize, of course, that this Court will not grant certiorari merely to correct error. The decision below, however, in sanctioning acknowledged ambiguity in instructions on a basic issue, marks an important departure from the doctrine of *Bollenbach* and, indeed, completely subverts it. Of equal importance, the opinion of the court below reveals in every line an unmistakable tendency, which only review by this Court can restrain, to search the record for any basis, however strained and implausible, to sustain a verdict supported by evidence of guilt on some theory, in complete disregard of a basic policy that the question for an appellate court is "not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in federal courts," *Bollenbach v. United States, supra,* at 614, even if the "appellate court is left without doubt" that the appellant is "guilty," Id. at 615.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 15, 1962.